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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1940

No. 933

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

v.

ABRAHAM I. MENIN, Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.

PETITION FOR WRIT OF CERTIORARI.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
By G. BOWDOIN CRAIGHILL,
Counsel for the Petitioner,

LOUIS W. DAWSON,
VINCENT KEANE,
of Counsel.

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Supreme Court of the United States

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No. ------

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Petitioner,
v.
ABRAHAM I. MENIN, Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of The Mutual Life Insurance Company of New York respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

In this case, the United States Circuit Court of Appeals for the Second Circuit has held that as an incident to a sale under the Bankruptcy Act of good will of a corporation, the corporation might and should be perpetually enjoined from thereafter using its corporate name, not only in the business in which the corporation had been engaged prior to its financial difficulties, but also in any other business in any way similar thereto.

The opinion of the Circuit Court of Appeals is reported in 115 Fed. (2d) 975. On January 10, 1941, the Circuit Court of Appeals entered a decree in accordance with that opinion. That is the decree now sought to be reviewed. It appears as the last paper printed in the record submitted with this petition. The jurisdiction of this Court is invoked pursuant to section 240(a) of the Judicial Code.

In August, 1939, the corporation above referred to—American Art Association-Anderson Galleries Inc., a corporation organized under the Laws of New York—filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The corporation had for many years conducted an art sales auction gallery in New York City. At the time the proceeding for the arrangement was begun, the debtor had wholly ceased its activities and no longer had a place of business (R. 56).

In January, 1940, the referee advertised a proposed sale of certain property of the debtor. The property to be offered was described in two groups, the first consisting of the trade fixtures of the debtor, which were then stored in warehouses, and the second, consisting of

> "The name of the debtor corporation, the right to use the same, the good will of the debtor corporation and all rights and privileges pertaining to the good will of the business formerly conducted by the debtor, including, but without limiting the generality of the foregoing, all books, records and books of reference other than books of account".

The notice expressly stated that the sale would not include any choses in action, accounts receivable or property held on consignment (R. 5-6).

On the sale day a change was made, in that the items described in the second group were divided into three parts and were sold in that fashion (R. 11-13, 20-24). Two portions, consisting of the debtor's Painting Sales Record, a

compilation of sales of paintings for over forty years (R. 13), and the debtor's Art Reference Library, were bid in by one Stirn, (R. 17-18, 22), who is in no way involved in this litigation. The remainder of the second group—that is, the "good will" portion of it—and the trade fixtures, were bid in by the respondent, Parke-Bernet Galleries, Inc., but in separate lots (R. 21-24). Four days later the referee entered an ex parte order confirming the sale and perpetually enjoining the debtor from further use of its corporate name (R. 25-28).

The sale of the good will item was made over the objection of your petitioner, the holder as pledgee of all the shares of capital stock of the debtor corporation (R. 13-14, 24, 29-30).

No arrangement or reorganization has ever been effected in this matter. Three weeks after the above mentioned sale, the debtor was adjudged a bankrupt and the proceeding has since been an ordinary bankruptcy (R. 1).

Your petitioner obtained a review by a District Judge of the referee's order. The Judge concluded that there might be no sale of the bankrupt's corporate name as such, and set aside the attempted sale of the lot which purported to include that name. He expressly declined to pass upon whether an effective sale of good will might be made in this case (R. 47-50).

The trustee in bankruptcy and Parke-Bernet Galleries, Inc. prosecuted an appeal to the Circuit Court of Appeals (R. 51-54), which Court reversed the order of the District Judge and modified the referee's order so as to permit the use of the debtor's name in another business in no way similar to that theretofore conducted (R. 66-7).

B

Reasons Relied on for the Allowance of the Writ

1. The holding in this case by the Circuit Court of Appeals for the Second Circuit that the debtor might not re-enter its former line of business under its corporate name, is directly contrary to the holding of the Circuit Court of Appeals for the Sixth Circuit in *Theobald-Jansen Electric Co.* v. *Harry I. Wood Electric Co.*, 285 Fed. 29, that a corporate bankrupt might not be deprived of the free use of its name. The holding is also contrary to the views expressed by the Circuit Court of Appeals for the Fifth Circuit in *Sawilowsky* v. *Brown*, 288 Fed. 533, 536, and to the views expressed by the Circuit Court of Appeals for the Ninth Circuit in *Beauchamp* v. *United States*, 76 Fed. (2d), 663, 667.

2. The Circuit Court of Appeals has drawn a distinction in this case between the rights of a corporate bankrupt and the rights of an individual bankrupt, with respect to the resumption of business under the bankrupt's name. That distinction is nowhere suggested in the Bankruptcy Act itself, nor does the Circuit Court refer to any statutory basis therefor. The basis assigned in the opinion is that a corporation does not need the same protection as an individual, since the stockholders may re-enter the field, either singly under their own names, or collectively under a new corporate name. This conclusion is stated to be based upon an analogy between the trade name by which an individual might designate a shop or other enterprise conducted by him, and the name of a corporation. Your petitioner submits that there is no analogy, for such a trade-name designates merely a portion of the property and activities of the individual, while a corporation is a legal entity which, by virtue of section 4 of the Bankruptcy Act, may become a bankrupt.

3. The holding in this case by the Circuit Court of Appeals is at variance with the law of New York as authoritatively declared in *Von Bremen* v. *MacMonnies*, 200 N. Y. 41 and in *Matter of Brown*, 242 N. Y. 1, 10, to wit, that (a) even a voluntary sale of a business deprives the seller merely of his right to solicit the former customers, but not of the right to compete with the buyer in the same line of business; (b) that an owner involuntarily dispossessed of a business, may not only freely compete with the buyer, but may even solicit the old customers.

4. The Circuit Court of Appeals in this case has permitted the sale of good will in gross, contrary to the rule laid down by this Court in *Metropolitan Bank* v. *St. Louis Dispatch*, 149 U. S. 436, 446. The Court in its opinion assumed, without discussion, that the two lots bid in by the respondent, Parke-Bernet Galleries, Inc., gave it enough to enable it to carry on in true succession to the old business, a point which the District Judge had declined to pass upon (R. 48). Parke-Bernet bought only the furniture the debtor then had (which was stored in warehouses) R. 6, 12, and the "good will" lot (R. 23-4). It thereby acquired no place of business, no personnel, nor any goods to sell (R. 12-13, 56). At no stage of this proceeding has there been any hearing as to the propriety of the injunction of which your petitioner complains.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 17349, The Mutual Life Insurance Company of New York, Appellee, against Abraham I. Menin, Trustee in

Bankruptcy, and Parke-Bernet Galleries, Inc., Appellants, (originally docketed under the title In the Matter of American Art Association-Anderson Galleries, Inc., Debtor-Bankrupt) and that the said decree of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
By G. BOWDOIN CRAIGHILL
Counsel for the Petitioner

LOUIS W. DAWSON
VINCENT KEANE
of Counsel

Office - Supreme Court, U. S.
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No. 933

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

v.

ABRAHAM I. MENIN, as Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.,

Respondents.

TRUSTEE'S MEMORANDUM IN OPPOSITION TO PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

ABRAHAM I. MENIN,
As trustee in bankruptcy of American Art Association—Anderson Galleries, Inc., respondent.

By GERSON C. YOUNG,
Attorney and counsel for the said respondent.
55 Liberty Street,
Borough of Manhattan,
New York City, N. Y.

GERSON C. YOUNG,
EVERETT M. SEIXAS, JR.,
Counsel.

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Supreme Court of the United States

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
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v.
ABRAHAM I. MENIN, as Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.,
Respondents.
No. 933

TRUSTEE'S MEMORANDUM IN OPPOSITION TO PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

May it please this Honorable Court:

The respondent, Abraham I. Menin, as trustee in bankruptcy of American Art Association—Anderson Galleries, Inc., respectfully shows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On August 14, 1939, American Art Association—Anderson Galleries, Inc., as debtor, filed a petition in the United States District Court, Southern District of New York, seeking to effect an arrangement pursuant to Chapter XI of the Bankruptcy Act. The debtor retained possession of its assets and a Referee in Bankruptcy was appointed to hear the matter. From time to time, various

plans for an arrangement were submitted, but none was ever consummated.

On January 9, 1940, an order was made requiring all parties in interest to show cause why all the assets of the debtor, tangible and intangible, including the debtor's corporate name, goodwill and accounts receivable, should not be sold. Pursuant to this order a sale was held by the Referee on January 22, 1940, notice having first been given to all creditors and other parties in interest.

The business of the debtor was that of art auctioneer and its reputation was nationwide. As an auctioneer, the debtor owned no physical property, other than furniture, fixtures and miscellaneous equipment. The debtor did not own the premises in which it did business, but, as was pointed out in the opinion of Judge Learned Hand, "in modern times, especially in a city like New York, the mere privilege of doing business at the old site is not of prime consequence" (fol. 62).

At the sale the respondent Parke-Bernet Galleries, Inc. purchased two of the four lots offered for sale, one lot comprising all the furniture, fixtures and business paraphernalia of the debtor, and the other the debtor's name and goodwill, with all the rights and privileges pertaining thereto, including the debtor's books, records, reference books, customers lists, interest in subsidiary corporations, contracts containing restrictive covenants, sales catalogues and some accounts receivable. The remaining two lots comprised two separate collections, one described as the "Painting Sales Record", consisting of records of previous auction sales, and the other as the "Reference Library".

The petitioner noted its objection to the sale of the corporate name, goodwill and other items mentioned in Part

IV of the notice of sale, on the ground that, as the pledgee of all the issued and outstanding capital stock of the debtor, it alone was entitled to the name and goodwill of the debtor. The petitioner had never reduced the pledge of the stock to terms of possession and was not, in fact, the legal owner of the stock. The Referee overruled the objection of the petitioner and confirmed the sale. Shortly thereafter the debtor was adjudicated a bankrupt and the respondent, Abraham I. Menin, was duly elected trustee in bankruptcy of the debtor.

The petitioner sought a review by the District Court for the Southern District of New York, of the Referee's order confirming the sale. Upon such review the District Court set aside the sale and remanded the matter to the Referee, with directions that the corporate name of the bankrupt be not sold.

From the order setting aside the sale, an appeal was taken to the United States Circuit Court of Appeals, for the Second Circuit, by both the trustee in bankruptcy and Parke-Bernet Galleries, Inc., the purchaser. On that appeal, the order of the District Court was, by unanimous decision, reversed, although the order of the Referee was, in some respects, modified.

A decree in accordance with the opinion of the Circuit Court of Appeals was entered on January 10, 1941, and it is from that decree that the petitioner now seeks relief in this Court (fols. 75-76).

The opinion of the United States Circuit Court of Appeals is reported in 115 F. (2d) 975.

B

REASONS FOR THE DENIAL BY THIS COURT OF THE WRIT SOUGHT BY THE PETITIONER.

The opinion of Judge Learned Hand shows clearly that the Circuit Court of Appeals considered all the issues raised by the parties and, after a close examination and full discussion of the authorities, came to the conclusion that no previous decision of any other Court directly controlled the result reached in the case, and that "there being no decisive weight of authority to the contrary" the Court was free to hold that a corporate name, as an incident to the transfer of the goodwill of a corporation, could be transferred to a purchaser and could be used without distinguishing phrase free from competition by the bankrupt, in the same business, or in another business (fol. 65).

That conclusion is in no way contrary to the holding of the Circuit Court of Appeals for the *Sixth* Circuit in *Theobold-Jansen Electric Company* v. *Harry I. Wood Electric Co.,* 285 Fed. 29, which, as was pointed out on the argument before the Circuit Court in behalf of the respondent, merely held that where the corporate name is not ***expressly*** sold, it does not pass with the goodwill of a corporation sold by a trustee in bankruptcy.

Nor is that conclusion in any way contrary to the holding of the Circuit Court of Appeals for the *Fifth* Circuit in *Sawilowsky* v. *Brown,* 288 Fed. 533, for in that case it was decided that, so far as a trade name was concerned, it could be sold by a trustee in bankruptcy, and that the purchaser could protect his purchase of the trade name as against the bankrupt.

Nor is that conclusion in any way contrary to the holding of the Circuit Court of Appeals for the *Ninth* Circuit

in *Beauchamp* v. *United States,* 76 Fed. (2) 663, in which an attempt was made to enforce by criminal contempt proceedings an order directing the sale of the name of an individual, as distinguished from the sale of the name of a corporation.

Your respondent contends that in the case at bar the Circuit Court of Appeals for the *Second* Circuit properly distinguished between a corporate name and an individual name and correctly relied upon the analogy between a corporate name and a trade name. That a trade name can be sold by a trustee in bankruptcy is not open to dispute.

Sawilowsky v. *Brown,* 288 Fed. 533 (C. C. A. 5th);
Rice & Hutchins, Inc. v. *Vera Shoe Co. Inc.,* 290 Fed. 124 (C. C. A. 2nd);
Woodward v. *White Satin Mills Corp.,* 42 Fed. (2nd) 987 (C. C. A. 8th);
U. S. Ozone Co. v. *U. S. Ozone Co.,* 62 Fed. (2nd) 881 (C. C. A. 7th).

That a corporate name should, therefore, be saleable in bankruptcy, is but a logical and necessary development and extension of an existing doctrine. The case of *S. F. Myers Co.* v. *Tuttle,* 188 Fed. 532, is ample authority for that assertion.

To sell the name of an *individual* along with the goodwill of that individual's business might work a hardship of a character which the Courts would be loath to impose, but no such hardship is apparent in the case of the sale of a *corporate* name. The principal objective of the Bankruptcy Act is to vest in a trustee in bankruptcy title to *all* of the property of a bankrupt, with certain specific exemptions or

exceptions. Section 70 of the Bankruptcy Act clearly indicates that objective, but does not include among the exemptions or exceptions the *name* of a bankrupt corporation.

If a corporate name has value—and, as was pointed out in this case by the Circuit Court of Appeals, the corporate name of the debtor was, indeed, a prime asset—there is no reason, at law or in equity, why the creditors of the bankrupt should not be entitled to dispose of its corporate name, precisely as they might dispose of a trade name, at the best price offered for it. We submit that the rulings of the Circuit Court of Appeals were correct in every respect.

As to the petitioner's objection that the goodwill of the debtor was sold in gross, the opinion of the Circuit Court shows clearly that the Court was satisfied that sufficient of the assets of the debtor were sold to Parke-Bernet Galleries, Inc. to warrant a finding that the *goodwill* was properly disposed of as *part* of a going concern.

With respect to the petitioner's statement that "it (Parke-Bernet Galleries, Inc., the purchaser) thereby acquired no place of business, no personnel, nor any goods to sell (R. 12-13, 56)", it is enough to say that the debtor had no place of business which it could transfer, and owned no goods which it could sell. The debtor's business consisted of its name, its goodwill, its books and records, its lists of customers, its contracts, its interest in subsidiary corporations, and its furniture and fixtures. Substantially all of these items were purchased by Parke-Bernet Galleries, Inc. at the Referee's sale.

Equity requires that creditors be permitted to realize upon every asset of value belonging to a bankrupt. It comes with ill grace from one whose standing is not even that of a stockholder, to assert a claim that the sale of an

asset of value belonging to a bankrupt corporation should be upset and the rights of its creditors thus invaded.

WHEREFORE, your respondent respectfully prays that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, in case No. 17349 on the docket of that Court, entitled *The Mutual Life Insurance Company of New York, appellee* v. *Abraham I. Menin, trustee in bankruptcy, and Parke-Bernet Galleries, Inc., appellants,* be denied, and that your respondent have such other or further relief in the premises as to this Honorable Court may seem just and proper, and your respondent will ever pray.

Dated, New York City, May 6th, 1941.

ABRAHAM I. MENIN,
As trustee in bankruptcy of American Art Association—Anderson Galleries, Inc.

By GERSON C. YOUNG,
Attorney and counsel for the said respondent.
55 Liberty Street,
Borough of Manhattan,
New York City, N. Y.

GERSON C. YOUNG,
EVERETT M. SEIXAS, JR.,
Counsel.

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Supreme Court of the United States

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
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ABRAHAM I. MENIN, Trustee in Bankruptcy, and PARKE-BERNET GALLERIES, INC.

BRIEF FOR RESPONDENT PARKE-BERNET GALLERIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARKE-BERNET GALLERIES, INC.,
By J. ARTHUR LEVE,
Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

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BRIEF OF PARKE-BERNET GALLERIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Report of Opinion.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 115 F. (2d) 975.

Statement.

Petitioner is the pledgee of the stock of the American Art Association-Anderson Galleries, Inc., the bankrupt. The latter had originally filed a petition as debtor under Chapter XI of the Bankruptcy Act for an arrangement and, while this was pending, petitioned the Referee in Bankruptcy for an order permitting (a) the sale of its furniture, fixtures, equipment and other physical assets, with certain exceptions, and, in addition (b) "the name of the debtor corporation, the right to use the same," its good will, and all rights and privileges pertaining to the good will of the business formerly conducted by the debtor, including all books, records and books of references other than books of account (R. 8-9). Certain other assets were excluded.

Parke-Bernet Galleries, Inc. paid $5,750 for the furniture, fixtures and equipment (R. 21-22) and $6,500 for the name, good will, manuscript and catalogue, etc. (R. 23-24).

The decision of the Circuit Court of Appeals does not prohibit the bankrupt from using its name in any business other than that in which it had been theretofore engaged or one similar thereto. *Mutual Life Insurance Co.* v. *Menin, et al.,* 115 F. (2d) 975, 979, marginal note.

Argument.

In the absence of bankruptcy proceedings, the petitioner, by proper corporate procedure, could have sold any of its assets, tangible or intangible, including its name and good will. *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.,* 208 U. S. 554; *U. S. Ozone Co.* v. *U. S. Ozone Co.,* 62 F. (2d) 881 (C. C. A. 7th Cir.); *The Metropolitan Telephone and Telegraph Co., et al.* v. *Metropolitan Telephone and Telegraph Co.,* 156 App. Div. 577; *Slater* v. *Slater,* 175 N. Y. 143; *Ajax Tool Co., Inc.* v. *Buchalter Tool Co., Inc.,* 125 Misc. 752.

There seems no potent or logical reason why a bankruptcy court should not have like power to dispose of all of the assets of a corporation for the benefit of creditors.

In the case of *Theobald-Jansen Electric Co.* v. *Harry I. Wood Electric Co.,* 285 Fed. 29 (C. C. A. 6th Cir.), cited by petitioner, it appeared that the order directing the sale of the bankrupt's assets included, in addition to furniture, merchandise, fixtures, etc., the good will and use of the trade-name of the business. The District Court required the Referee's order to be so limited that any sale of the trade-name was not to be treated as equivalent to and should not operate in any way to include the corporate name of the bankrupt, the bankrupt itself having objected to the use of its corporate name.

It thus appears that, whereas in the instant situation the debtor consented to the sale of its corporate name, in *Theobald-Jansen Electric Co.* v. *Harry I. Wood Electric Co.,*

285 Fed. 29, the sale was forced contrary to the wishes of the bankrupt corporation.

As to *Sawilowsky* v. *Brown,* 288 Fed. 533 (C. C. A. 5th Cir.), and *Beauchamp* v. *United States,* 76 F. (2d) 663 (C. C. A. 9th Cir.) they involved the use by an individual of his name as distinguished from a corporation. A corporation, however, is quite different. It does not need the same protection as individuals do with respect to the use of its name. A franchise granted to a corporation gives the shareholders collectively no more than the right to engage in a business. Thus, though it may have the same privilege as an individual to continue, it would logically follow that the shareholders under the corporate form could be properly forbidden from competing under its own name.

Any discussion as to what is included in a voluntary sale of a business is not pertinent to the present situation, since the sale of the bankrupt's name as part of the good will was specifically included in the order of sale.

It appears ineluctably from the record that the order confirming the sale included substantial assets affecting the good will of the bankrupt, such as certain correspondence pertaining to the good will and two restrictive covenants found in certain contracts, as well as manuscript and catalogue and a public library (R. 23).

The decision of the Circuit Court of Appeals was in direct accordance with sound legal reasoning, and no novel question of widespread interest has been presented as a reason for any review by this Court.

CONCLUSION.

Petition for writ of certiorari should be denied.

Respectfully submitted,

PARKE-BERNET GALLERIES, INC.,
By J. ARTHUR LEVE,
Counsel.